(3) when the appellant pleaded guilty he did not appreciate the ingredients of the offence for which he was charged and therefore the conviction and sentence must be set aside.

MAGISTRATE'S CRIMINAL APPEAL.

M. Edgar for the appellant.

H. S. Ong (Federal Counsel) for the respondent.

Buhagiar J. : — The appellant was charged with an offence under regulation 16(3) of the Emergency (Registration Areas) Regulation, 1948 and punishable under regulation 20A of these Regulations.

The accused pleaded guilty and admitted the facts as set out on the reverse of the application for summons attached to the charge. These facts were that a police officer went to the hotel of which the appellant is Managing Partner and of which he is in charge and saw a lady running out from a room in the hotel. He stopped her and told her to return to the room. In the room he saw a Chinese male who was hurriedly dressing. The woman was not completely dressed. On investigation it was found that the names of these two persons were not entered in the register of the hotel. On admission of these facts by the appellant the appellant was convicted and sentenced to a fine of $1,000.

This is an appeal from that conviction and sentence on two grounds (1) the illegality of the trial and of the sentence and (2) that the facts admitted disclosed no offence. For the purpose of this appeal it is sufficient if I deal with the second ground of appeal.

Counsel for the appellant submitted that the facts as disclosed do not amount to an offence under regulation 16(3) of the aforesaid Regulations. That regulation applies to cases where the proprietor and manager etc. of the hotel "accommodates any person"; it was submitted by counsel that the word "accommodate" in these regulations has the same meaning as in the Boarding House Enactment (F.M.S. Cap. 87) and in the rules made thereunder. Under rule 17 of these Rules information is to be furnished to the manager or proprietor of boarding house when a guest is staying there for one night or longer; similarly the word "accommodate" in the regulation under which the appellant was charged cannot mean a casual occupation of part of the premises or a room in a boarding house.

I do not think it is necessary to refer to the Boarding Houses Enactment to come to the conclusion that the word "accommodate" in these regulations cannot have the meaning given to it by the prosecution, but the Rules under that Enactment support that view.

The object and purpose of these Regulations is to have a check on people within a registration area and regulation 16 was not intended to have a check on people who casually and for a temporary purpose make use of a room in a hotel. I agree therefore that the facts as admitted by the appellant do not amount to an offence and the appellant should have been acquitted It is obvious that when the appellant pleaded guilty he did not appreciate the ingredients of the offence with which he was charged; these were not explained to him as it is clear that the learned President took a wrong interpretation of the Regulation.

The appeal is therefore allowed and conviction and sentence are set aside and the fine, if paid, should be refunded to the appellant.

Appeal allowed.

Solicitors: *Bannon & Bailey.*

ORIENTAL BANK OF MALAYA LTD. v. N. SUBRAMANIAM

[C.A. (Thomson C.J. (F.M.), Whyatt C.J. (S) and Buhagiar J.) May 30, 1957]

[K. L. — F.M. Civil Appeal No. 57 of 1956]

Banking — Guarantee — Construction of — Surrounding circumstances.

In this case the respondent executed a letter of guarantee in the following form: "In consideration of your having at my request agreed to allow N. Krishnan to overdraw his current banking account with you to the extent of $25,000 in accordance with the terms of the Personal Bond overleaf, I guarantee repayment to you of any sum to the extent of $25,000 as shall be due by the said N. Krishnan on account of such overdraft together with accrued interest, whenever I am called upon to do so. This guarantee shall be a continuing guarantee and shall remain in force till such time that the said N. Krishnan shall have fully and completely paid all amounts due to you in respect of such overdraft." At the date of the execution of the letter of guarantee the respondent knew that N. Krishnan, who was his brother, had a debit balance of $26,150 at the bank, made up of actual advances amounting to $19,288 and interest and service charges amounting to $6,862. The appellants sued N. Krishnan as principal and the respondent as guarantor for $28,877 being money lent to the principal and interest and charges. The respondent in his defence argued that he had only guaranteed the debt of the principal in respect of overdrafts made to him by the bank after the date of execution of the letter of guarantee and that these advances with interest amounted to $379, which sum he brought into Court. The trial Judge gave judgment to the appellant for $379 only with costs to the respondent.

Held: (1) the letter of guarantee must be construed with regard to the surrounding circumstances;

(2) in this case the overdraft mentioned in the letter of guarantee was the overdraft which was in existence when it was executed and therefore the respondent was liable to pay the sum of $28,877 being the total of the debit balance of the principal.

Cases referred to:—

(1) *Reddie v. Williamson* (1863) 1 Macph. 228.

(2) *Inland Revenue Commissioners v. Holder* (1931) 2 K.B. 81.

(3) *Paton v. Inland Revenue Commissioners* (1938) A.C. 341.
(4) *Lloyd's v. Harper* 16 Ch. D. 290.
(5) *Nottingham Hide, Skin & Fat Market Co. v. Bottrill* 8 C.P.C. 696.

COURT OF APPEAL

Sir Roland Braddell (*S. D. K. Peddie* with him) for the appellant.

J. A. B. Lang (*H. W. Tan* with him) for the respondent.

Thomson C.J. : —On 10th April, 1957, we allowed the appeal against the judgment of Mr. Justice Smith in this case.

The defendants in the action were brothers who at all material times resided at Seremban where the first defendant carried on some sort of business.

From 1949 the first defendant had a current account with the plaintiff bank on which he was permitted almost from the beginning to overdraw regularly. Indeed, except for a short period of two or three days each the account was never in credit.

In July 1954, the affairs of the Seremban branch were engaging the attention of head-quarters' officials of the bank from Kuala Lumpur, and on 14th July 1954 certain arrangements were made regarding the first defendant's account with the bank. On that date the debit balance of his account was $26,150, made up of actual advances amounting to $19,288 and interest and service charges amounting to $6,862.

On 14th July, 1954, both defendants executed instruments on a printed form supplied by the bank. The portion of the form executed by the first defendant was headed "Personal Bond" and was in the form of a letter addressed to the bank. The material portions read as follows :—

"In consideration of your granting me an Overdraft up to a limit of $25,000 (dollars twenty five thousand only) I hereby agree as follows:—

1. That the interest on the above Overdraft shall be at the rate of $0.75 per $100 p.m.
2. That service and other charges payable under the Regulations of the Bank shall be debited to my account as and when due.
3. That in the event of your requesting me to settle the account at any time, I shall pay the whole amount due by me at that time within seven days from the date of your notice demanding settlement."

The portion of the form executed by the second defendants, which was on the same sheet of paper, was headed "Guarantee" and also took the form of a letter addressed to the bank. The material portions read as follows :—

"In consideration of your having at my . . . request agreed to allow N. Krishnan to overdraw on his . . . current banking account with you to the extent of $25,000 . . . only in accordance with the terms of the Personal Bond overleaf, I . . . the undersigned hereby . . . guarantee repayment to you of any sum to the extent of the said sum of $25,000 (dollars twenty five thousand only) or any part thereof, as shall be due by the said N. Krishnan on account of such overdraft together with any interest accrued thereon whenever I am . . . called upon to do so . . .

This guarantee shall be a continuing guarantee and shall remain in force till such time that the said N. Krishnan shall have fully and completely paid all amounts due to you in respect of such overdraft."

On 30th September 1955, the date of commencement of the present proceedings, the debit balance of the first defendant's account amounted to $28,877. The greater part of the increase in that debit balance since 14th July, 1954 was in respect of interest, advances after that date only amounting to $343.

In the event, the bank sued the first defendant as principal and the second defendant as guarantor for $28,877, being money lent to the first defendant and interest and charges. The proceedings were commenced by way of summary procedure, and in the event judgment was entered in default against the first defendant. The second defendant, however, obtained leave to defend and did defend the proceedings. His defence, briefly, was to the effect that he had only guaranteed the debt of the first defendant in respect of advances made to him by the bank after 14th July 1954, and that these advances with interest amounted to $379, which sum he brought into Court.

In the event the matter came on for trial before Smith J. who gave judgment for the plaintiff for $379 only with costs to the second defendant from the time of payment into Court.

It was against that judgment that the plaintiff appealed. We allowed the appeal and ordered that judgment be entered against the second defendant for the full amount claimed with costs.

The learned Judge took the view that the contract between the bank and the second defendant having been reduced to the form of a document no evidence was admissible to contradict or vary its terms as set out in that document except that by reason of proviso (f) to section 92 of the Evidence Ordinance evidence was admissible to show in what manner the document was related to existing facts. Considering the existing facts in relation to the language of the document he proceeded to construe it which he did in the following terms :—

"What (*it*) refers to is the 'overdraft' of the first defendant. That overdraft is calculated from day to day and is the debit balance at any time. (See evidence of PW 3). What the second defendant guaranteed was not 'advances not exceeding $25,000 and interest thereon' but 'repayment . . . of any sum to the extent of the said sum of $25,000 . . . due . . . on account of such overdraft'. Since the overdraft of the first defendant exceeded $25,000 on 14th July the only logical interpretation which can be put on the Personal Bond and Guarantee is that it relates to a further overdraft of $25,000 which will permit the total account to be overdrawn to the extent of $50,000."

From these conclusions we found ourselves compelled to differ.

What were the facts relevant to the agreement between the parties as they existed on 14th July, 1954?

On that day the first defendant owed the Bank $26,150. The amount which he had drawn from his account exceeded the amount he had paid into it by $19,288. The balance amounting to $6,862 was made up of interest and a small amount in respect of service charges. In accordance with the ordinary practice of bankers in which the first defendant must be taken to have acquiesced, the interest which was at the rate of $0.75 per dollar per month was compounded, that is to say at the end of each month interest was calculated on the highest debit balance during the month and then added to the debit balance at the end of the month.

This is an ordinary practice of bankers and, in the ordinary usage of the word "overdraft" is the total amount standing to the debit of a customer's account at any given time, and the customer is said to over draw whenever he obtains money from the bank so as to convert a credit balance into a debit balance or to increase the amount of an existing debit balance.

But are the words "overdraft" and "overdraw" used in that sense in the document in the present case?

In the first place, it is to be construed as a matter of pure construction. The guarantee says that the bank has agreed to allow the first defendant "to overdraw on his current banking account to the extent of $25,000." That is the consideration, and there is no indication as to whether the drawing has been in the past or is to be in the future. Then comes the statement of what is promised. It is "repayment to you of any sum to the extent of the said sum of $25,000 as shall be due by the said N. Krishnan on account of such overdraft together with any interest accrued thereon". Here, the overdraft and the interest on it are treated as different things, but if "overdraft" were used in the ordinary sense there could be no distinction between the overdraft and the interest on it because at any given time the interest which had accrued would have been capitalized and included in the overdraft itself. On the face of the document, then, there is a definite indication that in it the word "overdraft" is not used in the ordinary sense but is used meaning only so much of the overdraft in the ordinary sense as has not originated in interest.

To return to the facts as they existed at 14th July 1954, these would serve to fortify and clarify this conclusion. Regarding some of these facts there was a great deal of controversy. There was, however, no controversy as to the actual state of the first defendant's account on that date, and the trial Judge has found as a fact that when he executed the guarantee the second defendant knew that the first defendant already owed the bank a considerable sum.

There was never at any time any question of a new account being opened between the first defendant and the bank. There was never any suggestion that the limit on the overdraft in the ordinary sense of the word or on the actual loans by the bank should be $50,000. It is clear that the old account was to continue its currency, and there was no suggestion that there were to be two overdrafts, one of them the overdraft that was owing on 14th July 1954, and another overdraft that might come into notional existence as a result of transactions between the bank and the first defendant after that date. There is not a scrap of evidence anywhere in the case to support any such suggestion, and in the absence of any evidence it would be wrong and contrary to all experience to suppose that anything of this sort happened.

In the circumstances, the conclusion seems unavoidable that the overdraft mentioned in the letter of guarantee was the overdraft which was in existence on 14th July. That overdraft was clearly to continue in existence after that date, and no other overdraft was in contemplation of the parties. This clearly leads to the further result that the fact that on 14th July the debit balance of the account was over $25,000 whereas the actual nett advances to first defendant were less than that amount shows that in the letter of guarantee the expressions "overdraft" and "overdraw" were used not in the ordinary sense but as referring to the actual amounts borrowed and to actual borrowings respectively.

A similar result follows from an examination of the portion of the document headed "Personal Bond". The consideration is: "your granting me an overdraft up to a limit of $25,000". Here again, what the first defendant owed the bank was more than $25,000 but the cash advances he had had amounted to less than that sum. He was clearly going to go on owing money to the bank, that was the point of the whole transaction, and it would be surprising if the bank were going to take a personal bond from him it should only be for a sum less than his total indebtedness. But when we read further it is clear that no such surprising course was taken, for the actual promise he made was:—

> "That in the event of your requesting me to settle the account at any time, I shall pay the whole amount due by me at that time within seven days from the date of your notice demanding settlement."

He did not promise to "settle the overdraft"; he promised to "settle the account". Here it is clear that "overdraft" is used in the sense of advances in the "Personal Bond", and this again supports the view that it is used in the same sense in the letter of guarantee.

Before departing from the case I should add that at no time was our attention invited to the Scottish case of *Reddie v. Williamson*[1] nor to the English cases of

Inland Revenue Commissioners v. Holder[2] and *Paton v. Inland Revenue Commissioners*[3] in which *Reddie v. Williamson*[1] was discussed with approval. I am not suggesting for one moment that these cases would have assisted the appellant to any great extent, but they are mentioned to emphasise that in the present case we have not attempted to go beyond its own special facts.

Whyatt C.J. (S.) : — The question raised in this appeal is whether the plaintiff bank is entitled to recover $28,877.68 or only $379.71 under a guarantee given by the defendant in respect of his brother's current account at the bank. When the defendant signed the guarantee on the 14th July, 1954, the amount overdrawn on the current account was $26,150.85 but when the overdraft was called in on the 30th September 1955, it had risen, as a result of various debits and credits during this period, to $28,877.68: this is the sum which the bank now seek to recover as principal and interest in these proceedings. The defendant does not dispute this figure but contends that the guarantee only applies to fresh withdrawals made by his brother from his current account after the date of the guarantee. These were very few in number — only seven cheques totalling $343.62 were drawn on this account between the 14th July, 1954, and the 30th September, 1955 — and therefore, according to the defendant, the bank is entitled only to recover this sum plus a trifling amount for interest, making a total of $379.71.

The issue between the parties depends upon the construction to be placed upon the words of the guarantee. The principles to be followed in construing a document of this kind have never been more clearly stated than by Fry J. in the well-known case of *Lloyd's v. Harper*[4] where that learned Judge said: "A guarantee, like every other contract, must be construed reasonably; it must be construed by the words used but also with regard to the surrounding circumstances". What then were the surrounding circumstances on the 14th July 1954 when the defendant signed his guarantee? The defendant's brother's current account with the bank was heavily overdrawn, as indeed it had been for many months past, and the bank held no security of any kind. The bank had three courses open to them; they could allow their customer to continue to operate the overdrawn account subject to his providing security, or they could cease to honour cheques until the account was brought into credit, or they could simply allow matters to continue, relying solely upon their customer's personal credit. The bank adopted the first course. They allowed their customer to continue to operate his current account as before, after obtaining his signature to a personal bond and the defendant's signature to a guarantee.

These being the surrounding circumstances, the question is, what meaning is to be given to the words of the guarantee :—

> "In consideration of your having at my request agreed to allow N. Krishnan to overdraw his current banking account with you to the extent of $25,000 in accordance with the terms of the Personal Bond overleaf, I guarantee repayment to you of any sum to the extent of $25,000 as shall be due by the said N. Krishnan on account of such overdraft together with accrued interest, whenever I am called upon to do so. This guarantee shall be a continuing guarantee and shall remain in force till such time that the said N. Krishnan shall have fully and completely paid all amounts due to you in respect of such overdraft."

According to the view advanced on behalf of the defendant, which commended itself to the learned trial Judge, these words refer, not to the amount overdrawn on Krishnan's current account from time to time, but to an entirely new overdraft for $25,000, additional to the amount which was owing on the current account when the guarantee was signed on the 14th July 1954. The fallacy in this argument, in my opinion, is that it treats the reference to the overdraft as if it were something which existed quite separate and distinct from the overdrawn current account whereas in fact the overdraft and the overdrawn current account are merely different names for one and the same thing. In other words there was only one surrounding circumstance, not two, so far as Krishnan's indebtedness to the bank was concerned, and that was the state of his current account with the bank. This being so, what would a man of business understand, (to apply the test propounded by Keating J. in the case of *Nottingham Hide, Skin & Fat Market Co. v. Bottrill*[5]) by this guarantee? There can, I think, be only one answer. He would understand that the defendant had guaranteed to repay to the bank the amount overdrawn by the customer on his current account, whenever called upon to do so, subject to a limit of $25,000. That is precisely the meaning which the plaintiff bank asks the Court to place upon it in this appeal. Moreover it is the meaning which the defendant himself placed upon it at one time as is shown by the fact that on the 14th August 1954, a month after signing the guarantee, he informed the plaintiffs that he was aware that Krishnan's current account was overdrawn to the extent of $26,000 and handed over to them some title deeds as collateral security. It is unfortunate that he did not adhere to his view as he will now have to pay not only the amount owing on the current account but the costs of these proceedings as well.

Buhagiar J. : — I have had the advantage of reading the judgment of my brother Judges in this appeal. I agree with the conclusions reached and I have nothing to add.

Order accordingly.

Solicitors: *Bannon & Bailey: H. W. Tan & Co.*